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Women in Robes

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WOMEN IN ROBES

BY SITAL KALANTRY

**GREATER REPRESENTATION OF WOMEN IN COURTROOMS
IS IMPORTANT NOT JUST FOR DIVERSITY—IT'S ESSENTIAL
FOR ADVANCING ACCESS TO JUSTICE FOR WOMEN.**

For the first time in United States history, three of the nine justices sitting on the Supreme Court are women. About 33 percent of state and federal court judges in the U.S. are women, slightly higher than the global average of 27 percent.

Why does this matter? Scores of empirical studies have attempted to determine whether the gender of a judge makes a difference to his or her decisions. But regardless of whether it does, equal representation for women in the judiciary strengthens the rule of law and should be a goal across the Americas.

Increasingly, women in the region have overcome stiff challenges to becoming judges. Although the statistics for Latin American countries are slightly lower overall than in the U.S., they signal impressive progress. [SEE TABLE 1] For example, in 2010 18 percent of judges in Brazil's highest court were women, compared to 0 percent in 1998. In Peru,

TABLE 1

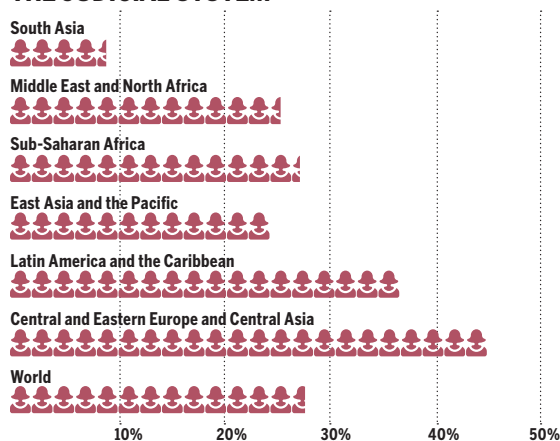
PERCENTAGE OF FEMALE JUDGES IN LATIN AMERICA'S HIGHER COURTS

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008	2009	2010
ARGENTINA	0	0	0	0	0	0	11	22	29	29	29	29	29
BELIZE	0	0	0	0	0	0	0	17	29	29	33	22	22
BOLIVIA	—	—	—	—	—	—	—	—	—	—	25	20	18
BRAZIL	0	0	9	9	9	9	9	9	18	18	18	18	18
CHILE	—	—	—	—	—	5	5	5	5	24	16	25	25
COLOMBIA	0	0	0	0	4	9	9	9	9	13	17	17	32
COSTA RICA	10	9	9	12	13	17	17	20	22	26	26	30	35
DOMINICAN REPUBLIC	—	—	—	31	31	31	31	31	31	31	31	31	23
EL SALVADOR	13	13	13	13	13	13	13	13	33	33	33	33	33
GUATEMALA	15	15	23	23	23	23	23	15	15	15	15	15	8
HONDURAS	—	—	—	—	—	—	—	—	—	—	53	20	20
MEXICO	9	9	9	9	9	9	18	18	18	18	18	18	18
NICARAGUA	—	—	—	—	—	—	—	—	—	—	25	27	29
PANAMA	22	22	22	22	11	11	22	22	22	22	11	11	0
PARAGUAY	0	0	0	0	0	0	11	11	11	11	11	11	22
PERU	6	6	6	6	6	6	6	6	6	6	6	6	23
PUERTO RICO	—	—	—	—	—	—	—	—	—	—	29	43	43
SURINAME	9	9	9	8	8	8	8	9	9	9	33	33	53
URUGUAY	0	0	0	0	0	0	0	0	20	20	0	0	0
VENEZUELA	20	7	0	5	5	10	10	28	31	31	31	32	36

Source: UN ECLAC, <http://website.eclac.cl/sisgen/ConsultaIntegrada.asp?idAplicacion=111&idioma=i>, last accessed on June 18, 2012.

TABLE 2

WOMEN'S REPRESENTATION IN THE JUDICIAL SYSTEM

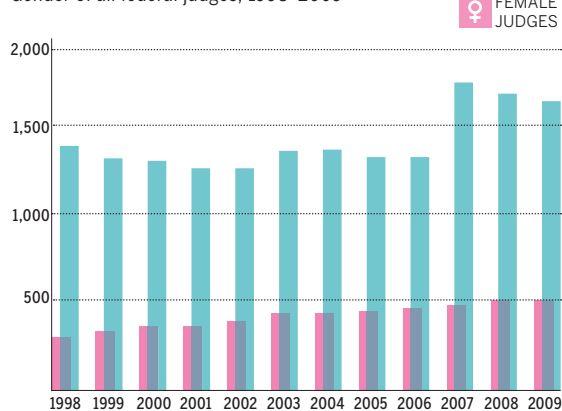


Source: UN Women, 2011-2012 Progress of the World's Women (New York: UN Women, 2011).

TABLE 3

U.S. COURTS FEDERAL BENCH GENDER SNAPSHOT

Gender of all federal judges, 1998-2009

Source: http://www.uscourts.gov/news/TheThirdBranch/10-10-01/Federal_Bench_Gender_Snapshot.aspx, last accessed on June 18, 2012.

the figure was 23 percent in 2010 versus 6 percent in 1998.

A notable exception to the low representation of women on judiciaries is the Eastern Caribbean Supreme Court—the highest court for nine countries, including Antigua and Barbuda, Grenada and Saint Kitts and Nevis. Over 60 percent of judges on this court are women.

In terms of gender parity, courts in Latin America and the Caribbean rank second in the developing world. [SEE TABLE 2] According to the 2011–2012 UN Women report *Progress of the World's Women*, Central and Eastern Europe and Central Asian countries have the most women judges in the world—over 40 percent.¹

Even in the U.S., progress toward equality on the courts has been slow. While women occupied approximately 20 percent of all federal judge seats in the U.S. a decade ago, they fill only about 30 percent of such seats today. [SEE TABLE 3] Although the Canadian Supreme Court, in which four of nine judges are women, is touted as the world's first gender-balanced national high court, women comprise about only 32 percent of all judges in Canada's lower courts.

More troubling still: in some countries the share of women judges has actually decreased over time. Take Guatemala, where women constituted 15 percent of judges on the highest court in 2009, but only 8 percent in 2010. In Panama, women constituted 11 percent of judges (one of nine) on the highest court in 2009, but were entirely absent from the court in 2010. The precise reason for this is unclear, but women were not appointed to fill seats vacated by women judges. In Panama, for example, the Supreme Court's nine justices each serve a term of only 10 years, so there is fairly frequent turnover and an increased possibility of losing women on the bench.

GETTING INTO THE CLUB

Across the globe, women judges report that an “old boys’ club” mentality surrounding judicial appointments poses a crucial barrier to entry in the legal profession, particularly in the higher courts.

In the vast majority of cases, judges are appointed by the executive or legislature, sometimes upon the recommendation of commissions—which puts a premium on political connections. Women are typically less connected to these appointment and selection mechanisms than are their male colleagues. In some countries, depending on the level of the court, judges are selected by merit, on the basis of performance on exams. In courts where exams are used to select judges, women tend to be represented in higher numbers. In one such country,

France, over 50 percent of the judges are women.

A U.S. survey conducted in the early 1990s by the Task Force on Gender Bias for the Federal Court of Appeals for the Ninth Circuit found that men and women judges and lawyers in the U.S. have different perceptions about gender bias.² Female judges and lawyers believed that women are excluded from formal and informal networks that influence judicial selection, while male judges and lawyers generally believed that the gender composition of the judiciary was a consequence of merit-based decision-making. Similarly, a 2006 survey of 239 judges in Texas found that 27 percent of women judges believed women had a more difficult time than men in becoming a judge, while only 17 percent of the male judge respondents thought that was the case.³

These findings have not been limited to the United States. In a survey of judges in Northern Ireland conducted in 2004, socializing in informal networks such as “golf clubs” was considered to be influential in judicial appointments. This had an adverse impact on women, who were often excluded from these networking opportunities. One judge noted that even when women were included, family obligations prevented them from participating.⁴

More recently, women judges from around the world surveyed by the Virtue Foundation in 2011 echoed these findings, with nearly 70 percent of respondents saying that the lack of networks and connections that facilitate advancement is a major challenge for women in their pursuit of judgeships.⁵ Anecdotally, one female attorney who regularly practices before a High Court in India noted that her male colleagues had the private telephone numbers of male judges among their cell phone contacts. In India, judges are appointed to High Courts upon the recommendation of the senior judges on those High Courts. This attorney clearly felt that she, unlike some of her male counterparts, did not have the connections to be considered.

In addition, 65 percent of the respondents to the Virtue Foundation survey identified finances as a barrier to entry. A high level of educational attainment is a prerequisite to becoming a judge. In many countries in the Global South, public schools are of such poor quality that parents must send their children to expensive private schools. In some countries, particularly in South Asia, where poor families have to choose between educating girls or boys, boys are typically sent to school. As a result, women have disproportionately less access to quality education and are less likely to become judges.

Even after a woman becomes a judge, she faces unique obstacles. The most important challenge cited by women judges in the Virtue Foundation survey was balancing work and family responsibilities (96 percent).

Overt discrimination may also keep women from being appointed to powerful court governance committees or lead them to be appointed only to certain types of courts, such as family or juvenile courts. For example, Brenda Hale—Baroness Hale of Richmond—a justice on the Supreme Court of the United Kingdom since 2009 and High Court judge since 2004, recalls that early in her career, male judges asked her to leave the room following dinner so that they could talk among themselves.

GENDER AND DECISION-MAKING

In making the case for increased gender parity in courts, some argue that women reach different (and presumably better) decisions than men. There are a number of theoretical approaches to this question. The “different voice” approach, espoused by psychologist Carol Gilligan, suggests that women judges are likely to bring a unique feminine perspective to the bench, since women and men are inherently different. However, the application of this theory in the context of the work of judges has received much criticism because it strikes at the heart of the fundamental characteristics required of a judge: impartiality and objectivity.

Another theory, known as “representational theory,” suggests that women on the bench will represent the interests of other women and will use it as an opportunity to make decisions that favor equality.

A third theory, described by academics Christina Boyd, Lee Epstein and Andrew Martin, is the “informational theory,” which suggests that women don’t necessarily represent a class but that their professional experiences give them unique and valuable information that may impact their decision-making.

Patricia Wald, a former U.S. appellate judge and justice on the International Criminal Tribunal for the Former Yugoslavia, expressed this attitude when she said, “Being treated by society as a woman can be a vital element of a judge’s experience. [...] A judge is the sum of her experiences and if she has suffered disadvantages or discrimination as a woman, she is apt to be sensitive to its subtle expressions or to paternalism.”

According to Professors Boyd, Epstein and Martin, over 30 empirical studies have been conducted to determine whether the gender of a judge influences the decisions he or she makes. About one-third of these studies show

that women judges come to different conclusions than male judges, about one-third have mixed results, and the final third find no sex-based differences whatsoever.

A cluster of studies, however, show a correlation between gender and judicial outcomes in a specific set of cases: sex discrimination in employment. A 2010 study by Boyd, Epstein and Martin analyzed 13 areas of decisions handed down by U.S. appellate courts, where judges hear and decide cases in panels of three.⁶ They found that in cases implying sex discrimination on the job, the probability of a judge deciding in favor of the party alleging discrimination decreased by 10 percentage points when the judge was a male. Conversely, when a woman was on such a panel, the likelihood of a male judge ruling in favor of the plaintiff increased from 2 to 14 percent.

The authors believe their results are consistent with an informational account of the impact of gender. The assumption that the authors must make is that the women judges they studied have at some point in their careers faced discrimination in the workplace and have brought those experiences to bear when deciding cases in which such claims are made.

There are many well-known examples of such discrimination. For example, U.S. Supreme Court Justice Ruth Bader Ginsburg was forced to work as a typist after being denied a civil service position because she was pregnant. In 1956, as one of only nine women in a class of 400 at Harvard Law School, she was asked by the dean why she was taking up a place that might otherwise have gone to a man.

Further supporting the notion that personal experiences can impact a judge’s decisions, academics Pat Chew and Robert Kelley found that, in cases of racial discrimination in employment, judges’ gender does not affect case outcomes, but their race does.⁷ Thus, U.S. Supreme Court Justice Sonia Sotomayor’s now-famous statement that “a wise Latina” woman will bring her experience to bear in judging may have indeed been right.

Rosalind Dixon of the University of Chicago Law School points out that the experiences of more recent women appointees to the bench differ from their predecessors.⁸ For example, Justices Sotomayor and Elena Kagan have had greater access to various professional opportunities, such as law-review membership, large-firm practice and prestigious appellate clerkships. Thus, Dixon argues, the more recent female judicial appointees may be no more likely to rule in favor of the plaintiff in employment discrimination cases than their male colleagues. She warns the feminist movement

WOMEN IN MEXICO'S DRUG TRADE

BY RICHARD ANDRÉ

against giving too much heed to the “representational” theory and blindly pushing for more women judges, pointing out that not all women judges will make pro-feminist decisions.

BEYOND OUTCOMES

Irrespective of whether a judge’s gender influences her decisions, there are additional reasons for wanting a gender-balanced judiciary. The first argument is based on equality of opportunity. As Hale has noted, “All properly qualified and suitable candidates should have a fair crack of the whip and an equal chance of appointment, being considered impartially and solely on their merits and not in some other way or for some other reason.”

As noted above, one of the key challenges that women face in becoming judges is a lack of equal opportunity.

Additional reasons to increase women’s representation in the judiciary revolve around its importance in strengthening the rule of law. In the U.S., defendants can expect to be tried by a jury of their peers; similarly, composition of the judiciary should reflect the demographic makeup of society. This includes not only gender, but also race, religion, economic class, and sexual orientation. Judiciaries that are representative of the people will be considered more legitimate, and can count on greater trust and confidence from the public at large.

Conversely, lack of diversity in judiciaries could undermine public confidence in the judicial process. As Nelson Mandela observed during his trial in South Africa’s apartheid era, “Why is it that in this courtroom I face a white magistrate, am confronted by a white prosecutor, and escorted into the dock by a white orderly? Can anyone honestly and seriously suggest that in this type of atmosphere, the scales of justice are evenly balanced?”

A third reason in support of a diverse judiciary is that it is more likely to lead to better informed and impartial decisions. Drawing from the vast literature on juries, studies have shown that racially mixed mock juries are more likely to deliberate longer, discuss a greater number of case facts, and consider issues relating to race than all-white juries.⁹ This view also supports the information-based theories about judges bringing their experiences to bear upon their decisions.

Another important reason why we need women judges is the fact that the presence of women judges, particularly on trial courts, can create a more hospitable environment for people who appear before the court. Trial courts, although less studied than high courts, are the

From major motion pictures like *Maria Full of Grace* (2004) to best-selling crime thrillers like *Satanás* (2003), the portrayal of women as unwitting accomplices in organized crime has long been a staple of U.S. and Latin American media. It is true that in criminal syndicates dominated by men, women have typically occupied low ranks as mules, lookouts and sex workers. But over the past decade, as drug networks have moved from South America to Mexico and Central America, the cartels—and gender roles within them—have changed.

The shift has been particularly dramatic in Mexico, where the number of women convicted for crimes related to the drug trade grew by an estimated 400 percent between 2007 and 2010 alone. Women now occupy high-ranking positions as decision-makers, proprietors of *narco-tienditas* (where small quantities of drugs are sold), lieutenants, assassins, money launderers and *ganchas*, who assist with kidnappings by luring men into vulnerable situations.

What explains this? For one, the armed conflict over drug trafficking in Mexico and Central America has diminished many organizations’ numbers, and “tapping into a new population (i.e., women) makes re-

plenishing their ranks a lot easier,” says Patrick Corcoran, writer for *InSight—Organized Crime in the Americas*. In other cases, the girlfriend or wife of a cartel member who has been killed or imprisoned might take over his duties to support herself and her family. Others may simply be attracted by the money.

The social and economic space now occupied by women criminals “gives media a new angle on an old story,” says Corcoran. Romanticized narratives about women *capos* are captivating audiences region-wide. *La Reina del Sur* (2002), a crime novel about a Sinaloa woman-turned-major-trafficker in southern Spain, is one of the best-selling novels in the genre. And last year, Telemundo turned the novel into its most expensive *telenovela* ever, with a budget of \$10 million.

But once they’re caught, female narco bosses and their sisters in crime face the same unglamorous reality as their male counterparts.

While the proportion of women prisoners in Mexico is a mere 5 percent of the male prisoner population, their numbers have climbed sharply. Between 1999 and 2010, the female prison population in Mexico nearly doubled, from 6,000 to over 10,000. Most are between ages 18 and 26.

first place where people have direct contact with the justice system: as witnesses, plaintiffs, defendants, victims, and observers. Trial courts are also effectively courts of last resort for many people, since most trial court judgments are never appealed.

Many women survivors of violence recount the discriminatory attitudes they encounter within the criminal justice system and courtrooms by police and prosecutors who don't believe them and by judges who are insensitive to them or question their motives. This problem exists in many parts of the world today and the U.S. is no exception. Although clearly changing, the gender bias task forces created by courts in the mid-1980s and 1990s found that some judges presume that victims

gina Wood in Ghana has spearheaded the creation of a specialized Family Justice Center that provides holistic support to survivors of violence. Justice Inés Highton de Nolasco, vice president of the Argentine Supreme Court, helped launch a domestic violence office in the court that focuses exclusively on providing legal, medical and other professional support to survivors of domestic violence. Judge Ann Claire Williams of the U.S. Federal Court of Appeals for the Seventh Circuit has led training programs for other judges around the world on best practices in gender justice issues.

Examples like these abound across the world. Justice Gita Mittal of the Delhi High Court in India is creating a courtroom that allows child witnesses who have

THERE MUST BE GENDER PARITY IN THE JUDICIARY TO FURTHER EQUALITY OF OPPORTUNITY, ENHANCE COURTS' LEGITIMACY AND STRENGTHEN THE RULE OF LAW.

of domestic violence provoked or deserved violence. Of course there are exceptions—not all women will behave sensitively toward other women, and there are many gender-sensitive male judges—but overall, more gender-balanced courtrooms can make the process less agonizing for women and girls who appear before them, particularly trauma victims.

Related to this is the role that women judges can play in eradicating gender-based violence. Globally, common estimates are that one in every three women experiences violence over the course of her lifetime. (And much of it is believed to occur at the hands of a family member.) By complying with the law in their decisionmaking and implementing structural changes to improve access to justice for women and girls, women judges are leading the charge against gender-based violence.

In a recent article in the *Cornell International Law Journal*, former Supreme Court Justice Sandra Day O'Connor and Avon Global Center steering committee Chair Kim Azzarelli noted many such examples. Chief Justice Geor-

been victims of violence to testify on a live video camera rather than confront their alleged abusers in person.

We have yet to achieve gender parity in judiciaries across the Americas. Progress has been made, but it is slow and sometimes there has been regression. We don't know definitively whether, all else being equal, women and men judges rule differently. We do know, however, that there must be gender parity in the judiciary to further equality of opportunity for all people, enhance courts' legitimacy and strengthen the rule of law. Most important, equality on the bench can promote fairness in the courts and structural changes that improve access to justice for women and girls.

Sital Kalantry is clinical professor of law at Cornell Law School and faculty director of Cornell's Avon Global Center for Women and Justice.

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